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Subdivision Exactions and Access to Public Beaches

SUBDIVISION EXACTIONS AND ACCESS TO PUBLIC BEACHES

Public beaches cannot be enjoyed by the nation's citizens unless there is sufficient access for the public to the shorefront. Construction and development on the privately owned land parallelling public beaches can hinder access to the shore unless proper provision is made for public access through this private property. The problem of ensuring sufficient access to public beaches has grown in recent years with the increasing demand for vacation homes in resort areas. Where development has already occurred, the only alternative is for the condemnation and public purchase of easements or lands in fee for the required access routes. While the Coastal Zone Management Act provides in sec. 315(2) for the federal funding of up to one half of the cost of "acquiring lands for access to public beaches and other public coastal areas," states and localities may find it difficult to fund their share of such costs, especially with rising land prices brought on by increasing demand for shorefront property.

Where development has not yet occurred, an alternative to public purchase of access routes may be found in the utilization of the subdivision exaction. This ideal has been adopted in California by a recent statute, Cal. Gov. Code sec. 66478.11. The statute provides that:

> No local agency shall approve either the tentative or final map of any subdivision fronting upon the coastline or shoreline which subdivision does not provide or have available reasonable public access by fee or easement from public highways to land below the ordinary high water mark on any ocean coastline or bay shoreline within or at a reasonable distance from the subdivision.

Subdivision exactions are a product of the process by which developers gain permission from localities to subdivide their land for eventual sale and construction. In Virginia, subdivision means "the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved . . . any division of a parcel of land." Va. Code Ann. sec. 15.1-4.31(L)(1976 Supp.). Before a developer may subdivide land, he must comply with certain regulations adopted by the municipality. Thus, the subdivision exaction is essentially a condition precedent to the securing of authority to subdivide land. The California statute represents a bold advance in the utilization of subdivis

exactions from developers. Ordinarily, a local government may compel a subdivider to provide for utilities within the subdivision as an exercise of the power to provide for the public health, safety, and general welfare. For example, a locality may constitutionally require a developer to provide for water systems, Zastro v. Village of Brown Deer, 9 Wis.2d 100, 100 N.W. 359 (1960), community sewer lines, Stanco v. Suozzi, 11 Misc. 2d 784, 171 N.Y.S.2d 997 (1958), and curbs and gutters, Petterson v. City of Naperville, 9 Ill.2d 233 (1960).

The rationality of such requirements cannot seriously be questioned, as it is clearly within the public health, safety, and general welfare to prohibit the subdivision of land without provision for the utilities essential to the subdivision. However, a revolution of sorts occurred after the decision in Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949), where a subdivider was required to dedicate land for the widening of a street even though the increased traffic on the street was only partially caused by the subdivision. While it had been generally assumed that developers could be required to provide the essential utilities needed by a new subdivision (e.g., streets, water lines and sewer lines), the court in Ayres permitted the exaction to occur on a showing that the exaction was "reasonably related" to the needs of the entire community, and not required solely by the subdivision. The liberal standard of the Ayres decision was later adopted by other courts throughout the country in several decisions upholding the right of localities to compel subdividers to dedicate or help pay for park and recreation lands, on the "reasonableness" standard. Jenad v. Village of Scarsdale, 18 N.Y.2d 78, 240 N.Y.S.2d 955, 218 N.E.2d 673 (1966), Jordan v. Village of Menomenee Falls, 28 Wis.2d 608, 137 N.W.442 (1965), Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

Other courts, however, adopted a more restrictive view, permitting subdivision exactions only where the need for the subject of the exaction was "uniquely attributable" to the subdivision itself. Under this standard, an exaction requiring a subdivider to set aside land for a school was invalidated as violative of the Constitutional requirement for the compensation of public takings of private land in Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961). Other courts have employed the "uniquely attributable" formula, but have upheld the subdivision exaction. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (parkland), Aunt Hack Ridge Estates, Inc. v. Planning Commission of the City of Danbury, 160 Conn. 109, 273 A.2d 880 (1970) (park and recreation land).

The distinction between the "reasonableness" standard and the "uniquely attributable" standard is essentially one of allocation of the burden of proof. Courts adopting the "reasonableness" formula imply that the subdivision of land is "not a right, but a privilege", placing the burden of demonstrating the "unreasonableness" of the exaction on the subdivider. The courts which follow the "uniquely attributable" standard place the burden of proof on the municipality to prove that the exaction is not an unconstitutional taking of private property for public use without just compensation.

The California beach access statute has not yet been the subject of a reported decision from that state. Its chances of survival in California appear to be good based on the liberal standards which have been applied by the California courts in other subdivision exaction cases. Because the Virginia Supreme Court has never ruled on the validity of a specific subdivision exaction, the standards that would be applied in such a situation remain a matter of conjecture. However, this should not preclude further study in the possible adoption of a statute similar to the California one. Given the new mandate that states developing coastal zone management plans must provide for planning processes for insuring adequate public access to beaches [Coastal Zone Management Act, sec. 305(b)(7) (1972) as amended by P. L. 94-320 (1976)], the subdivision exaction may provide an alternative to the expensive process of condemnation and purchase.